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Dynamic References to OECD standards

Compatibility with the European principle of legality of taxation

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Contents

Abstract

This thesis examines dynamic references in EU secondary legislation to standards developed and adopted by the OECD and their compatibility with the European principle of legality of taxation. It aims to provide a proposal on how dynamic references to OECD standards legally function and what legal implications they entail. This understanding of dynamic references is subsequently applied to the European principle of legality of taxation.

Dynamic references automatically incorporate the referenced content into the referring legal order. Therefore, soft law adopted at the level of the OECD is elevated into legally binding EU law through the mechanism of dynamic references. This entails an obligation for the Member States to implement the referenced content within their domestic legal order.

The European principle of legality of taxation functions as a legal framework that determines both the legal admissibility and the legal limits of the use of dynamic references. In principle, dynamic references to the OECD are compatible with the European principle of legality of taxation insofar as they concern the adoption of non-essential elements of a tax law. Conversely, the essential elements of a tax law must always be enacted through a due legislative procedure under the Treaties.

Moreover, dynamic references to the OECD should additionally require a specificity requirement, requesting the EU legislator to clearly define the scope, objectives, content and duration of the dynamic reference.

The thesis further recommends strict judicial review of these requirements in order to ensure the existing legal limits and strengthen the legal safeguards to avoid the arbitrary use of dynamic references to the OECD.

Keywords: Dynamic References, Principle of Legality of Taxation, Dynamic Interpretation, Essentiality, Specificity

Abbreviations

ATAD	Anti-Tax Avoidance Directive
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
DAC	Directive on Administrative Cooperation
ECHR	European Convention on Human Rights
E.g.	For example
EU	European Union
G20	Group of Twenty
IF	Inclusive Framework
OECD	Organisation for Economic Co-operation and Development
TEU	Treaty of the European Union
TFEU	Treaty of the Functioning of the European Union

1 Introduction

1.1 Background

The EU legislator increasingly draws on international agreed standards developed within the OECD and the OECD/G20 IF when implementing legislation on direct taxation. The way it is used differs significantly in terms of its legal implications for EU tax law. The EU legislator sometimes relies on standards[1] produced within the OECD to implement them into EU legislation.[2] Furthermore the produced standards on OECD level, such as commentaries and guidelines, are used as a source for interpretation and application of EU tax law.[3] Another relatively new form is the dynamic reference to standards subsequently adopted at the level and under the procedures of the OECD.[4] What they all have in common is their reliance on standards previously or subsequently[5] produced at the OECD level.

The OECD is an intergovernmental international organization with the aim to promote economic growth, contribute to the economic expansion in member and non-member countries and support the expansion of world trade on a multilateral basis.[6] The OECD is not part of the EU`s institutional structure. However, most of the EU Member States are part of the OECD.[7] Albeit the EU is not a formal member of the OECD,[8] the European Commission takes part in the work of the organization and is allowed to contribute to the preparation of texts and to participate in discussions.[9] Therefore, the status of the EU in the OECD is multifaceted and goes

[1] The term ´standard`is used to include all the different legal instruments available to the OECD and IF. In principle, agreed standards on the level of the OECD and the IF only produce soft law and have no direct legally binding effect within EU law. See for a detailed explanation in chapter: 2.2.2.

[2] E.g. Council Directive (EU) 2016/1164 of 12 July 2016 on laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193 (ATAD), which is mainly based on the Base Erosion and Profit Shifting project; Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union, OJ L 328/1, which is largely the result of the OECD/G20 IF Global Anti-Base Erosion (GloBE) Rules.

[3] See for example recitals (11), (22), (24) of the preamble to the Global Minimum Tax Directive. The CJEU explicitly approved the use of OECD material for interpreting EU law in joined cases C-115/16 et al., *N Luxembourg 1 et al* [2019] ECLI:EU:C:2019:134, paras 90 et seq. However, it remains unclear whether the CJEU has approved their use only for static interpretation or also for dynamic interpretation.

[4] E.g. Article 32 Global Minimum Tax Directive, although there is some debate as to how exactly Art. 32 should be legally classified. See also Article 3 (18) of the Proposal for a Council Directive on transfer pricing, COM (2023) 529 final (withdrawn from the Commission on 21 October 2025). In this proposal the requirement of a Union position under Article 218 (9) TFEU was established as a precondition.

[5] This distinction will later be discussed, when dealing with the difference between static and dynamic interpretation or reference.

[6] Convention on the Organisation for Economic Co-operation and Development, 14 December 1960, Article 1.

[7] Except Bulgaria, Croatia, Malta, Romania and Cyprus, but Bulgaria, Croatia and Romania are current accession candidates. The OECD also consists of states outside the EU.

[8] Even though, in principle, membership would be legally possible according to Article 47 TEU.

[9] Supplementary Protocol No. 1 to the Convention on the OECD, 14 December 1960; see also: OECD, Rules of Procedure, October 2013, rule 7.

beyond a mere subordinate role.[10] The EU can claim an influential role in OECD decision-making and policy development.[11]

The IF is a global tax governance network created by the OECD to support the implementation of its tax coordination project on base erosion and profit shifting.[12] As membership is not limited to OECD members, it comprises more than 140 jurisdictions worldwide.[13] Likewise, the EU is not a formal member but participates closely in the decision-making process through the European Commission.

Therefore, an intergovernmental organization without any integration in the EU`s formal legislation procedures[14] has a direct influence in shaping EU tax legislation and on its application and implementation by the Member States. As already mentioned, the extent and significance of the impact on EU legislation depend on the form in which OECD work is used. This thesis focuses on the impact and compatibility of dynamic references.

The legal classifications of dynamic references and the legal implications such references entail for the EU legislator and for the Member States have not yet been fully clarified. Moreover, questions remain regarding their compatibility with the European principle of legality of taxation.

Since further work at the OECD level[15] on issues of direct taxation can be expected in the future, a closer examination of the legal instrument of dynamic references available for the EU legislator seems worthwhile.

1.2 Purpose and research questions

This thesis aims to examine the compatibility of dynamic references in EU secondary legislation to OECD standards with the European principle of legality of taxation. In order to apply EU primary law to dynamic references it is necessary to clearly define what constitutes a dynamic reference at the EU level. This thesis therefore seeks to distinguish dynamic references from other legal instruments, such as the use for dynamic interpretation and the delegation of powers, and thereby to establish a clear definition of dynamic references to the OECD. Following that, the use of dynamic references is examined under the European principle of legality of taxation. The research question is whether dynamic references to the level of the OECD are, in

[10] The EU`s actual role depends on its participation in the individual bodies of the OECD, which have a large autonomy in deciding on their structure and decision-making. For further detail see: Joren Verschaeve/Tamara Takács, ´The EU`s International Identity: The Curious Case of the OECD` in Henri de Waele, Jan-Jaap Kuipers (eds), *The European Union`s Emerging International Identity`* (Martinus Nijhoff Publishers 2013) pages 194 et seqq.

[11] Sometimes the role of the EU is even referred to as a ´quasi-member´. See for further explanation on the involvement of the EU in the work of the OECD: Foivi Vlastou-Dimopoulou, ´Organisation for Economic Co-operation and Development (OECD) – The EU`s position as a de facto Member` in Ramses A. Wessel, Jed Odermatt (eds), *Research Handbook on the European Union and International Organizations* (Edward Elgar Publishing 2019).

[12] Allison Christians/Laurens van Apeldoorn, ´The OECD Inclusive Framework` (2018) Bulletin for International Taxation Vol. 72, No. 4/5, 226, 226.

[13] All member states are represented, except Cyprus.

[14] See Article 288 TFEU et seqq.

[15] When the author refers to the level of the OECD, the IF is also included, as it was convened by the OECD.

principle, compatible with the principle of legality of taxation and if answered in the affirmative, which limits must be observed.

1.3 Delimitations

The question of whether dynamic references to the OECD are sufficiently democratically legitimized and compatible with the European principle of democracy is not addressed in this thesis.[16] Furthermore, the thesis focuses exclusively on dynamic references to the level of the OECD and the IF. Dynamic references to other legal bodies, inside or outside the EU framework, are not discussed. The use of OECD materials for the dynamic interpretation of EU law or national law is not addressed.[17] Moreover, the compatibility of dynamic references with the national laws of the Member States is not mentioned. However, the author examines possible effects on the interpretation and application of EU primary law, deriving from the use of national legal measures.

1.4 Method and materials

This thesis examines the raised legal questions by following the legal-dogmatic research from an internal perspective.[18] Thus, only the positive law as it currently stands is used for answering the research question. For interpreting the law, the author relies on case law from the CJEU and academic literature. The only relevant applicable law and legal sources in this thesis are the European Treaties, the general principles of EU law and the OECD Convention.

1.5 Outline

The thesis begins by defining the legal characteristics of dynamic references to the OECD, namely their legal mechanisms and legal implications at both the EU and national levels. This includes distinguishing them from related legal concepts.
This is followed by a brief analysis of the relationship between EU primary law and EU secondary law, as well as the approach of the CJEU, in order to establish the applicable standard of review.
The thesis then proceeds with an analysis of the European principle of legality of taxation and the specific requirements it entails for the use of dynamic references to the OECD. Finally, dynamic references to the OECD are conceptualized and their legal limits and possible legal safeguards are evaluated, before the thesis concludes with final remarks and future perspectives.

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[16] See for an analysis on this question: Joachim Englisch, ´Dynamic References to International Soft Law Agreements: Flexibility with Limits` (2024) EC Tax Review Vol. 33, Issue 1.

[17] See Chapter 2.3.2 on the distinction between dynamic references and dynamic interpretation.

[18] Sjoerd Douma, *Legal Research in International and EU Tax Law* (Wolters Kluwer Business 2014) 17 et seqq.

2 Dynamic References and their legal characteristics

2.1 Purpose of Dynamic References to the OECD

To understand the legal implications and characteristics of dynamic references, it is essential to evaluate the reasons and advantages for their use in EU tax legislation. In relation to direct taxation, the EU can take legislative action only under the prerequisites set out in Article 115 TFEU.[19] A crucial formal requirement of Article 115 TFEU is the need for unanimity in the Council. As a consequence, the decision-making process may involve political compromises and extensive deliberations, which can result in a lengthy legislative procedure overall. In particular, after a previous unanimous decision in the Council, the amendment of an existing Directive tends to become even more challenging. This comprises the risk of immobile and outdated EU legislation, unable to respond promptly to further developments.[20] This effect stands out even more, when EU legislation is based on prior soft law agreements and standard setting on the level of the OECD or IF, as continuous work on details and improvements typically proceeds. Therefore, dynamic references to the level of the OECD can enhance the flexibility, adaptability and accuracy of EU tax legislation. It enables the EU legislator to react in a timely manner to developments on the level of the OECD, without awaiting a unanimous decision in the Council.
This is facilitated by the fact that standard setting on the level of the OECD and IF is typically easier to achieve, due to its soft law character and the corresponding lack of involvement of national legislators, public deliberations and need for formal ratification.[21]

Furthermore, depending on their design and use, dynamic references can provide greater clarity in EU tax law, as details can be incorporated by reference without overburdening the Directive itself.[22] This also correlates with the fact that the drafting of material, technical or formal details of the law can be entrusted to the OECD, an organization with extensive expert knowledge, thereby relieving the EU legislator from developing everything independently.

Another reason for using dynamic references is to secure the effectiveness of the law. As mentioned above, the EU legislator increasingly uses soft law agreements to

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[19] However, there are other discussed competences. For a comprehensive overview on the EU`s competence in direct taxation see: Georg Kofler, ´EU power to tax: Competences in the area of direct taxation` in Cristiana HJI Panayi et al (eds), *Research Handbook on European Union Taxation Law* (Edward Elgar Publishing 2020) pages 16 et seqq.

[20] Joachim Englisch, ´Hardening International Soft Law Standards Through EU Law: From Greater National Autonomy to a Legal Straitjacket?` in Raymond Luja (eds), *National Tax Autonomy and the European Union* (IBFD 2024) pages 60 et seq.

[21] Joachim Englisch, ´Hardening International Soft Law Standards Through EU Law: From Greater National Autonomy to a Legal Straitjacket?` in Raymond Luja (eds), *National Tax Autonomy and the European Union* (IBFD 2024) page 56; Danai Petropoulou Ionescu/Mariolina Eliantonio, ´Democratic Legitimacy and Soft Law in the EU Legal Order: A Theoretical Perspective` (2021) Journal of Contemporary European Research Vol. 17, No. 1.

[22] Frederic Stodt, *Dynamische Verweisungen* (Mohr Siebeck 2023) pages 31 et seqq.

subsequently implement them into EU hard law.[23] Besides the EU Member States, other states also agree to these standards and implement them into their domestic legislation. Dynamic references can ensure the uniform implementation and application of the law across non-EU states and thus promoting the effectiveness and underlying objectives of the law.[24]

To conclude, dynamic references to the level of the OECD can ensure the flexibility and efficiency of EU tax law. Their purpose is to facilitate and complement the EU´s legislative procedures in direct tax matters.
However, these are merely the reasons to rely on them, but that does not mean they comply with prerequisites of the European principle of legality of taxation.

2.2 Legal framework and characteristics

To apply the European principle of legality of taxation, it is necessary to clearly define what dynamic references to the OECD consist of and what legal implications they have for the EU and its Member States. As dynamic references to the OECD level are relatively new, there is yet no case law from the CJEU that provides a definition or a clear example of their application in EU tax law.[25] The author uses a teleological approach to define the mechanism of dynamic references to the OECD level in EU law, drawing on their purpose and benefits to conceptualize them.[26]
First, the basic legal framework of dynamic references to the OECD level and the definition and mechanism applied in this thesis are examined. Thereafter, the specific features of dynamic references to the OECD are presented in relation to their procedures for decision-making. Following that, the legal implications on EU and national law are addressed.

2.2.1 Definition and mechanism

First, it should be noted that dynamic references to the OECD level in EU law involve three different and autonomous legal levels. One level is the OECD and IF, where standards are developed through their procedures.[27] The second level is the European legal order. A dynamic reference in EU law always requires a European legal act as a point of reference through which it refers to another legal level. In the particular case of dynamic references to the OECD level, the European legal act will typically appear in the form of a Directive. This is because Article 115 TFEU, as the main legal competence for regulating direct taxation at EU level, only allows the EU legislator to issue Directives.[28] The third level comprises the domestic level from all

[23] See for examples: Joachim Englisch, ´Dynamic References to International Soft Law Agreements: Flexibility with Limits` (2024) EC Tax Review Vol. 33, Issue 1.

[24] A perfect example is the Global Anti-Base Erosion Model Rules (Pillar Two), which were agreed upon and developed by 148 states in the IF. The EU`s Global Minimum Tax Directive essentially derives from these rules.

[25] However, in the author`s view Article 32 of the Global Minimum Tax Directive represents a typical dynamic reference.

[26] A comparability analysis with regard to the domestic traditions of the Member States on the use of dynamic references is not examined, due to the legal speciality of the European legal order and its multi-tiered legal system.

[27] See chapter 2.2.2 for a clarification of the legal instruments available for the OECD and IF and how their decision-making procedures function.

[28] Georg Kofler, ´EU power to tax: Competences in the area of direct taxation` in Cristiana HJI Panayi et al (eds), *Research Handbook on European Union Taxation Law* (Edward Elgar Publishing 2020) page 17, notes that all

EU Member States. The Member States are obliged to implement the Directive`s intended result into their national law.[29] Notwithstanding that the choice of form and methods are entrusted to the Member States, the Member States have to give effect to the provisions of the Directive by means of national provisions of a binding nature.[30] However, the specific legal design depends on the legal traditions of the Member States concerned.[31]

As an interim conclusion, it can be stated that three separate legal levels are affected by dynamic references from EU law to the level of the OECD. When examining the compatibility with the European principle of legality of taxation, this distinction is crucial, as, although in principle autonomous from each other, all legal levels are interconnected and may also affect the assessment of the legality of dynamic references under the European principle of legality of taxation.

A dynamic reference to the level of the OECD always has its origin and reference point in EU secondary law. Through this secondary legislation,[32] the wording refers to a legal act on another legal level. The content of this legal act gets incorporated into the referring legal act. The referenced content becomes part of the referring legal act as a whole.[33] However, the dynamic reference can be used flexibly and may restrict the application on specific elements.
As the referenced legal content automatically becomes part of the referring legal order, it enjoys the same status and entails the same implications as the latter. Nevertheless, the referred legal act as such remains unaffected, only the content gets incorporated.[34]

This only explains the mechanism of a reference as such. The distinctive feature in the case of dynamic references is the dynamic incorporation of the referenced legal content. That means that the referring legal act always refers to the latest version of the referenced legal act.[35] Subsequent amendments thereto are therefore included.

One may wonder whether the incorporation into the referring legal act functions directly from the reference itself or whether a subsequent incorporation through EU secondary legislation is required to give the legal content the same legal effect. This

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existing tax directives in the field of direct taxation are based on Article 115 TFEU. Even if Article 116 TFEU would present a valid option, it would also only allow to issue Directives.

[29] See Article 288 (3) TFEU.

[30] Case C-97/81, *Commission vs. Netherlands* [1982] ECLI:EU:C:1982:193, para 12.

[31] E.g. an administrative practice would not suffice to comply with the requirement of a provision with binding nature. See for further examples: Marcus Klamert/Paul-John Loewenthal in Manuel Kellerbauer et al (eds), *The EU Treaties and Charter of Fundamental Rights: A Commentary* (2nd edition, Oxford University Press 2024) Art. 288 TFEU, para 23.

[32] In our case, this is realised through a Directive.

[33] The constituent elements and legal consequences of the legal act are incorporated.

[34] In relation to these explanations the author is influenced by the German legal traditions in the understanding of dynamic references. See: Thomas Clemens, ´Die Verweisung von einer Rechtsnorm auf andere Vorschriften: insbesondere ihre Verfassungsmäßigkeit` (1986) Archiv des öffentlichen Rechts Vol. 111, No. 1, 63, 65 et seqq.

[35] This seems to be commonly accepted in EU legal scholarship. See e.g.: Daniela Hohenwarter/Gunter Mayr, ´Pillar Two and BEFIT: Shocks and Opportunities for the EU internal market` (2024) European Taxation Vol. 64, Issue 10, 437, 441; Sigrid Hemels, ´National constitutions and EU primary law limits in the case of the implementation of the Pillar 2 Directive: the legality principle and Pillar 2` in Pasquale Pistone et al (eds), forthcoming book: *The Common Constitutional Tradition of the European Union and its Impact on Tax Law* (IBFD GREIT series); Juliane Kokott, *EU Tax Law* (C.H. Beck 2022) § 1, para 27.

would imply that the dynamic reference does not automatically incorporate the legal content but depends on subsequent action by the European legislator.
However, this would contradict the purpose and advantages of dynamic references. The flexibility, adaptability and legislative time saving would be undermined, as an additional legislative procedure under Article 115 TFEU, requiring unanimity, would be necessary. Therefore, under a teleological application, a dynamic reference automatically incorporates the referred legal content, without any subsequent action from the EU legislator.

In summary, a dynamic reference in EU law is established through secondary legislation, which references to another legal act from another legal body. The legal content of the referred legal act in its latest version directly[36] becomes part of the referencing legal act.
This definition and understanding of dynamic references in EU law is assumed in this thesis to clarify the subject matter of the examination. Nevertheless, the use and understanding of dynamic references may deviate from this approach, as the concept is not yet commonly accepted and applied in EU law.

2.2.2 Special features in relation to the OECD and IF

As already briefly touched upon, the OECD and IF, as convened by the OECD, do not form part of the European institutional framework. The legal instruments of the OECD consist of legally binding decisions on all the members and non-binding recommendations.[37] Both shall be made by mutual agreement of all the members.[38] In the field of direct tax law, the OECD operates exclusively through recommendations.

The European Union is not a member of the OECD.[39] Thus, irrespective of the legal instrument used by the OECD Council, such acts do not constitute EU law, nor are they legally binding as such for the European Union.[40]

Unlike the OECD, the IF has not published a legal framework setting out its procedures and legal instruments. There is no Convention constituting the legal basis and procedures of the IF. The basic idea of the IF is to include all members on an equal-footing with a consensus-based decision-making approach.[41] The decisions adopted within the IF do not entail legally binding obligations for the EU, due to the EU`s lack of membership.[42]

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[36] Ipso jure.

[37] Convention on the Organisation for Economic Co-operation and Development, 14 December 1960, Article 5.

[38] Convention on the Organisation for Economic Co-operation and Development, 14 December 1960, Article 6 (1).

[39] The European Union cannot directly participate in the decision-making process due to the lack of voting power. See: Convention on the Organisation for Economic Co-operation and Development, 14 December 1960, Article 6 (2).

[40] Foivi Vlastou-Dimopoulou, ´Organisation for Economic Co-operation and Development (OECD) – The EU`s position as a de facto Member` in Ramses A. Wessel, Jed Odermatt (eds), *Research Handbook on the European Union and International Organizations* (Edward Elgar Publishing 2019), pages 325 et seq.

[41] Allison Christians/Laurens van Apeldoorn, ´The OECD Inclusive Framework` (2018) Bulletin for International Taxation, Vol. 72, No. 4/5, 226, 226 et seqq.

[42] The majority of EU Member States are members of the IF. However, the same applies to them. The IF does not have the power to produce legally binding decisions.

Irrespective of the different structures and decision-making approaches, the key point is that standards agreed upon at the level of the OECD or IF are not directly legally binding for the EU.[43] They constitute soft law.[44]
Applied to the definition and mechanism of dynamic references in EU law assumed in this thesis, this means that the content of the agreed soft law gets incorporated into EU law, even though the EU, as a non-member, has no formal voting rights in the relevant decision-making process.[45] The soft law produced by the OECD and IF is elevated into a legally binding EU Directive.

2.2.3 Legal implications on EU and national law

The main legal implication on EU law is the incorporation of the standards developed at the level of the OECD and IF into the EU Directive. This entails the Commission`s responsibility to ensure the correct application of the Directive by the Member States, including the compliance with the incorporated standards.[46] Furthermore, as the referenced legal content is part of the Directive, it becomes judicially reviewable by the CJEU through the action for annulment under Article 263 TFEU or the preliminary ruling procedure under Article 267 TFEU.[47]

The EU Member States are obliged to implement the Directive`s intended result into national legally binding law.[48] This comprises the dynamic reference with its referenced content. Consequently, originally non-binding soft law becomes directly applicable and legally binding national law. In addition, the referenced content is legally enforceable before the national courts and legally binds all national authorities.[49]

Besides direct effect, a Directive also produces an indirect effect in the form that national law must be interpreted in the light and in accordance with EU law.[50] The scope of national law to be interpreted in accordance with the Directive is not limited

[43] The structure and decision-making procedures at both levels are complex and partly lack transparency. For answering the legal question, a brief overview suffices.

[44] The author understands the term soft law as a non-binding instrument with the aim to produce legal effects. Legal effects do not imply direct legally binding force, but an impact on EU law through the use for interpretation or guidance. See for a detailed analysis of the definition of soft law in the EU: Fabien Terpan, ´Soft Law in the European Union – The Changing Nature of EU Law` (2015) European Law Journal, Vol. 21, No 1; Luis Arroyo Jiménez, ´Beyond Bindingness: A Typology of EU Soft Law Legal Effects` in Petra L. Láncos, et al (eds), *The Legal Effects of EU Soft Law* (Edward Elgar Publishing 2023).

[45] The actual influence of the EU through participation in the work of the OECD and the influence on EU Member States voting habits is, however, significantly stronger. See: Foivi Vlastou-Dimopoulou, ´Organisation for Economic Co-operation and Development (OECD) – The EU`s position as a de facto Member` in Ramses A. Wessel, Jed Odermatt (eds), *Research Handbook on the European Union and International Organizations* (Edward Elgar Publishing 2019), page 326.

[46] See Article 17 (1) TEU.

[47] Different opinion in relation to Article 32 Global Minimum Tax Directive: Dennis Weber, ´The Pillar 2 – Side-by Side Package: A Structural Breach of EU Tax Law` Kluwer International Tax Blog, 08.01.2026. In the author`s view, it is clear that the referenced content is, in principle, subject to judicial review. However, the scope and criteria of judicial review that the CJEU may apply remain unclear. The decisive question is whether the CJEU can review the decision-making procedures and the outcome at OECD and IF level under EU law.

[48] Damian Chalmers, *European Union Law* (5th edition, Cambridge University Press 2024) page 108.

[49] On the one hand, the Directive`s is binding as to the obligation to take all the appropriate measures to ensure the intended result of the Directive. On the other hand, the national law implementing the Directive is legally binding on all national institutions in accordance with the national rule of law. See: Marcus Klamert/Paul-John Loewenthal in Manuel Kellerbauer et al (eds), *The EU Treaties and Charter of Fundamental Rights: A Commentary* (2nd edition, Oxford University Press 2024) Art. 288 TFEU, paras 19 et seqq.

[50] Case C-80/89, *Kolpinghuis Nijmegen* [1987] ECLI:EU:C1987:431, para 12.

to the implementing national law, but encompasses all national law to be interpreted in a way to achieve an outcome consistent with the Directive`s intended objective.[51] According to the CJEU the interpretation of a provision of EU law requires to consider its wording, the objectives it pursues, its context and its origin.[52] Therefore, a dynamic reference in EU law to the OECD level implies the obligation for Member States to refer to the wording, the legislative history and the underlying objective, which were essentially determined at the level of the OECD or IF.[53]

Another legal implication is the possibility of an initiation of an infringement procedure under Article 258 TFEU, if the Member State fails to fulfil its obligations in relation to the implementation of the Directive, including a failure to sufficiently implement the referenced content.

Moreover, the referenced content adopted at the level of the OECD must be published in the Official Journal of the European Union pursuant to Article 297 (1) TFEU. If the referenced content is not published in the Official Journal, this does not affect the validity of the dynamic reference itself, but the referenced content is only binding on the public if it has been correctly published in the Official Journal.[54] This entails the translation of the referenced content into the official languages of all Member States.[55]

To conclude, the use of dynamic references to OECD standards has various implications on EU law and the national law of the Member States.
What is remarkable is that, through the dynamic reference, original soft law has the same effect as EU law and through a Directive`s indirect effect on national law, the national institutions are also required to take into account the decision-making procedures at the OECD level when interpreting national law to comply with the obligation to interpret national law in accordance with the wording, objective and legislative history.[56] All this interpretation methods mainly concern the level of the OECD.[57]

2.3 Distinction to other legal concepts

So far, the definition, mechanism and legal implications of dynamic references in EU law to the OECD level have been outlined. In order to precisely narrow down

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[51] Case C-397/01, *Pfeiffer* [2004] ECLI:EU:C:2004:584, paras 115 et seqq; Case C-106/89, *Marleasing* [1190] ECLI:EU:C:1990:395, para 8.

[52] Case C-621/18, *Wightman* [2018] ECLI:EU:C2018:999, para 47.

[53] However, it is not entirely clear which documents are allowed to be used for the interpretation of the legislative history. See: Jasper Korving, ´The European Triangle: On the relationship between Primary EU Law, Secondary EU Law and National Law in the Field of Direct Taxation` (2024) European Business Law Review Vol. 35, Issue 1, 1, 12 et seq.

[54] Case C-160/20, *Stichting Rookpreventie Jeugd and Others* [2022] ECLI:EU:C:2022:101, paras 46 and 48; Case C-588/21, *Public.Resource:Org Inc.* [2024] ECLI:EU:C:2024:201, para 58; Case C-161/06, *Skoma-Lux sro* [2007] ECLI:EU:C:1997:369, paras 37 and 38.

[55] Case C-370/96, *Covita AVE* [1998] ECLI:EU:C:1998:567, para 27.

[56] See for further guidance: Jasper Korving, ´Interpretation of EU (Direct) Tax Directives: The Judges Will Decide` in Johan Lindholm, Anders Hultqvist (eds), *The Power to Tax in Europe* (Swedish Studies in European Law, Vol. 14, HART Publishing 2023).

[57] The specific way of dealing with this is not part of the thesis. It is only mentioned to point out the various legal implications of dynamic references in EU law.

the subject of research, it is necessary to distinguish the legal concept of dynamic references from other legal concepts in EU law.

2.3.1 Static references

The principle legal mechanism of static references is the same as that of dynamic references. The decisive difference is the version the referring legal act refers to. A static reference incorporates only the legal content of a specific version of another legal act that has already been established on the other legal level. Subsequent amendments of the referenced legal act are not included and therefore have no legal effect within the referring legal order.[58]
With regard to references to the level of the OECD, this means that the referring EU Directive incorporates only the legal content of an OECD standard as it exists at a fixed point in time.

2.3.2 Dynamic and static interpretation

Legal norms are inherently limited in their ability to sufficiently determine every situation that may fall within their scope. Thus, every legal act consists of a certain degree of indeterminacy.[59] This indeterminacy occurs when the legal norm is applied to a concrete situation. Interpretation aims to discover the sense of the norm in order to apply it correctly and realise its intended legal effect.[60] To interpret a legal norm in EU law different methods are utilized to ascertain its correct meaning, without a clear hierarchy among them.[61]

Therefore, the interpretation of a legal norm always requires an already enacted legal norm. There lies the main difference between the interpretation of norms and dynamic references. Interpretation begins one step after the dynamic reference. The dynamic reference, as incorporating the referenced legal act, is a legal norm to be interpreted. The dynamic reference itself, including its referenced content, is legally binding, while interpretation uses different methods to discover the true meaning of a legal norm, but without one single correct result.[62]

In EU tax law in particular, the use of OECD and IF material, such as the Commentaries or Administrative Guidance, is frequently discussed regarding the interpretation of EU Tax Directives and the national law of the Member States.[63] However, through the use for interpretation they only have an indirect effect on the application of EU law, without being legally binding.[64] They serve as a tool for

[58] Stijn Blaakman/Jasper Korving, ´The Legality of the Pillar Two Directive and the Role of OECD Interpretational Guidance` (2026) Intertax Vol. 54, Issue 6/7 [pre-publication], 1, 12; Frederic Stodt, *Dynamische Verweisungen* (Mohr Siebeck 2023) page 11.

[59] Hans Kelsen, ´On the theory of interpretation` (1990) Legal Studies Vol. 10, No. 2, 127, 128.

[60] Hans Kelsen, ´On the theory of interpretation` (1990) Legal Studies Vol. 10, No. 2, 127, 129.

[61] Case C-621/18, *Wightman* [2018] ECLI:EU:C2018:999 para 47, mentions the methods for interpreting EU law. See also chapter 2.2.3.

[62] Hans Kelsen, ´On the theory of interpretation` (1990) Legal Studies Vol. 10, No. 2, 127, 130.

[63] See for further guidance on this topic: Aitor Navarro, ´International Tax Soft Law Instruments: The Futility of the Static v. Dynamic Interpretation Debate` (2020) Intertax Vol. 48, Issue 10; Joachim Englisch, ´Dynamic References to International Soft Law Agreements: Flexibility with Limits` (2024) EC Tax Review Vol. 33, Issue 1.

[64] However, through an authorisation in EU law to recourse to OECD material, the use for interpretational purposes can be made mandatory. This does not change the fact that it is still not legally binding as such.

interpreting EU law, which ´competes` with other interpretative methods in order to ascertain the real meaning of the law.

To sum up, the dynamic or static interpretational use of OECD materials to EU law differs from dynamic references to OECD material in that interpretation seeks to understand a legally binding norm, but does not itself have any direct legal effect. However, the author is aware that the actual impact on the application of the implemented national legislation[65] by the national institutions may be similar. This depends on the admissibility and scope of recourse to OECD material for interpretational purposes within the Member States.[66]

2.3.3 Delegation of powers

The delegation of powers in the EU is multifaceted, ranging from the delegation of powers to the Commission under Articles 290 and 291 TFEU to the delegation of powers to European agencies, to EU administrative bodies and to EU independent authorities.[67] As the different legal structures, implications and requirements of the delegation of powers vary on a case-by-case basis, the author seeks to distinguish the main abstract differences between the delegation of powers and dynamic references to specify the subject of research, without addressing the different legal characteristics of the various options for the delegation of powers in the EU.

When delegating powers to another body, this body is granted the authority to set its own standards[68] within the scope of authority previously assigned to him. The adopted standards do not get incorporated into the legal level of the delegating act,[69] but have legal effects within their own legal sphere.[70] They do not become part of the delegating legal order and do not enjoy the same legal status. This is fundamentally different to dynamic references, where the referenced content becomes part of the referring legal act and automatically shares the same legal status. In relation to the addressee of the standard, another ´regulator` exists, which needs to be distinguished from the delegating institution.[71] Furthermore the delegating act is addressed to another body, enabling him to adopt standards, whereas dynamic references in EU law are directly addressed to the intended addressees of the law.[72]

To conclude, the legal effects of the delegation of powers and dynamic references are clearly distinguishable. The delegation of powers gives rise to a ´new regulator`, which adopts standards within its assigned legal framework with possible legal

[65] Provided that it concerns the implementation of a Directive.

[66] See for a detailed analysis: Maria Zvonarjova, ´Applicability of OECD-Developed GloBE Explanatory Materials within the Legal Framework of the European Union` (2025) International Tax Studies Issue 4.

[67] See for the differences: Edoardo Chiti, ´Decentralized Implementation: European Agencies` in Robert Schütze, Takis Tridimas (eds), *Oxford Principles of European Union Law* (Oxford University Press 2018) pages 754 et seq.

[68] The term ´standards´ is very vague and is used for including all the different legal instruments and in particular the rules adopted within these bodies.

[69] As is the case for dynamic references.

[70] Paul-John Loewenthal in Manuel Kellerbauer et al (eds), *The EU Treaties and Charter of Fundamental Rights: A Commentary* (2nd edition, Oxford University Press 2024) Art. 290 TFEU, para 16.

[71] This implies that judicial protection may be sought against this ´new regulator` under Article 263 (4) and (5) or Articles 265, 267 TFEU.

[72] In our case, the Member States constitute the addressees of the Directive.

effects.[73] In contrast, dynamic references incorporate the referenced content into its own legal level, with direct legally binding effects.

However, some similarities are undeniable. In the case of dynamic references to the level of the OECD, the EU allows another norm-setting body to influence its own legal order through the dynamic incorporation of the standards adopted on the OECD level. As a result, the OECD has an indirect impact on the legal content of the referring Directive.[74] The dynamic reference ultimately enables the OECD to determine the content of EU law and therefore, in practical terms, also delegates powers to the level of the OECD.[75]

2.4 Interim conclusion

The previous chapters aim to establish a clear understanding of how dynamic references in EU law are defined, what legal implications they entail at EU and national level and how they can be distinguished to other legal concepts in EU law. This is necessary in order to proceed with the examination of the subject in the light of the European principle of legality of taxation.
Due to the various legal instruments of the EU legislator and the lack of a common approach to dynamic references at EU level, this conclusion on the legal characteristics of dynamic references does not necessarily reflect the opinion of the CJEU or legal scholarship.
However, from a teleological perspective, these legal characteristics of dynamic references contribute the best to their purpose and advantages. Therefore, in this thesis, these characteristics are used as a basis to proceed with the examination.

3 Standard of review

3.1 Relationship between EU primary law and EU secondary law

Dynamic references originate in EU secondary law, particularly in the field of direct taxation, where they are primarily found in EU Directives. Thus, the legality of dynamic references depends on their compliance with EU primary law.[76] Primary EU law consists of the European Treaties,[77] the Charter of Fundamental Rights of the European Union and the general principles on which the EU legal system is

[73] Whether and what legal effects are possible depends on the scope of the delegation.

[74] The impact is only indirect, as the incorporation and its scope are determined solely through the dynamic reference.

[75] E.g., if the OECD decides to amend the referenced content. See: Frederic Stodt, *Dynamische Verweisungen* (Mohr Siebeck 2023) pages 35 et seq.

[76] Moritz Scherleitner, ´Increasing Direct Tax Harmonization and the Role of Tax-Relevant Economic Guarantees in Primary EU Law – a Reflection on a (yet to be Formed) Trend` (2025) Intertax Vol. 53, Issue 2, 141, 141; Rita Szudoczky, *The Sources of EU Law and Their Relationships: Lessons for the Field of Taxation* (IBFD Doctoral Series 2014, Vol. 32) pages 55 et seqq.

[77] TEU and TFEU.

based.[78] As EU secondary law derives from EU primary law, it is subordinate to the requirements of EU primary law and subject to judicial review before the CJEU regarding its compliance with EU primary law.[79] On the one hand, the requirements of EU primary law include the compliance with substantive provisions, such as the European fundamental freedoms or other general principles of EU law. On the other hand, it stipulates procedural provisions, such as the legal basis provisions.[80]

General principles of EU law do not provide straightforward answers for a clearly defined situation, but rather serve as a tool for guidance and interpretation for the legislator and judiciary.[81] They are generally applicable and, as they encompass a wide range of different situations, their design is abstract. Furthermore, general principles of EU law are not applied in an absolute manner, but must be balanced against other principles, taking into account their relative weight and importance under the concrete circumstances. By applying a general principle to concrete circumstances, while acknowledging other values or interests, the aim is to materialize the general principle as far as possible to achieve a sufficient degree.[82]

In relation to dynamic references in EU secondary law to standards adopted at the OECD level, this means that they must be examined in the light of EU primary law, focussing in particular on the European principle of legality of taxation.
If dynamic references violate the principle of legality of taxation, the consequence, upon review before the CJEU, is, in principle, their invalidity.[83]

3.2 Approach of the CJEU

Albeit the hierarchical relationship between EU primary law and EU secondary law seems clear,[84] the CJEU applies it in a rather inconsistent way. This is particularly important, as the CJEU enjoys the monopoly on judicial review of EU secondary law.[85] As a consequence, only the CJEU can declare EU secondary law invalid due to a violation of EU primary law. Until now, the CJEU seems reluctant to declare

[78] Lukasz Adamczyk/Alicia Majdańska, ´The Sources of EU Law relevant for Direct Taxation` in Michael Lang et al (eds), *Introduction to European Tax Law on Direct Taxation* (6th edition, Spiramus Press 2020) Chapter 1, para 2.

[79] Rita Szudoczky, ´The relationship between primary, secondary and national law` in Christiana HJI Panayi (eds), *Research Handbook on European Taxation Law* (Edward Elgar Publishing 2020) page 94.

[80] Ibid page 96.

[81] Frans Vanistendael, ´The Role of (Legal) Principles in EU Tax Law` in Cécile Brokelind (eds), *Principles of Law: Function, Status and Impact in EU Tax Law* (IBFD 2014) page 32 et seq.

[82] Adam Zalasiński, ´The Principle of Proportionality and (European) Tax Law´ in Cécile Brokelind (eds), *Principles of Law: Function, Status and Impact in EU Tax Law* (IBFD 2014) page 305 et seq; Juliane Kokott, *EU Tax Law* (C.H. Beck 2022) § 2, para 1.

[83] Rita Szudoczky, ´The relationship between primary, secondary and national law` in Christiana HJI Panayi (eds), *Research Handbook on European Taxation Law* (Edward Elgar Publishing 2020) page 95.

[84] In legal scholarship it is also argued to understand the relationship from a political point of view, meaning that primary law consists of general norms, which need to be interpreted and enriched by secondary law. However, this view is not taken in this thesis. See for a more detailed explanation: Jasper Korving, ´The European Triangle: On the relationship between Primary EU Law, Secondary EU Law and National Law in the Field of Direct Taxation` (2024) European Business Law Review Vol. 35, Issue 1, 1, 39 et seq.

[85] See Article 267 (1) (b) TFEU and Harald Eberhard, ´Das Legalitätsprinzip im Spannungsfeld von Gemeinschaftsrecht und nationalem Recht` (2008) Zeitschrift für öffentliches Recht Vol. 63, 49, 61.

EU secondary law invalid due to a violation of EU primary law.[86] The approach from the CJEU differs significantly with regard to the provisions of EU primary law that are examined. When ruling on the compatibility with general legal principles of EU law and fundamental rights, the CJEU increased its examination with EU secondary law.[87] However, regarding the compliance with fundamental freedoms, the CJEU limits its examination to review as to manifest error.[88] Furthermore, the CJEU tends to grant the EU legislator a broad discretion when exercising its legislative power in politically, economically and socially sensitive areas, which is only limited if a measure is ´manifestly inappropriate`.[89] In the *OE* case, the CJEU reviewed the principle of equal treatment. Whether this standard of review is limited to that principle or can be extended to other EU principles is yet to be seen.[90]
This thesis does not aim to provide a comprehensive overview over the CJEU`s reasoning.[91] However, it illustrates that the standard of review of EU secondary law in the light of EU primary law is still work in progress.

Regarding the principle of legality of taxation, which is examined in this thesis, the approach of the CJEU remains ambiguous and a clear benchmark has yet to be developed.
This is particularly exacerbated by the multi-tiered European legal system, where EU Tax Directives require an implementation of the Member States and are thus not directly addressed to the taxpayer.

4 Principle of legality of taxation

The principle of legality in the European legal order encompasses various characteristics, fields of applications and prerequisites that vary according to the addressee it governs and binds.[92] To answer the question at hand, it is only relevant to examine the prerequisites and obligations it imposes on the EU legislator. Moreover, it is particularly decisive what implications it entails for the field of EU Tax Law in relation to direct taxation. Thus, particular focus lies on the principle of legality of taxation.[93]

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[86] Marta Papis-Almansa, ´The End Does Not Justify the Means: On How the Secondary EU Law Infringes the Primary EU Law in the Light of the Recent Judgements of the CJEU` (2023) Intertax Vol. 51, Issue 8/9, with counterexamples.

[87] See e.g.: Case C-694/20, *Orde van Vlaamse Balies* [2022] ECLI:EU:C:2022:963; Case C-623/22, *Belgian Association of Tax Lawyers* [2024] ECLI:EU:C:2024:639.

[88] Case C-390/15, *RPO* [2017] ECLI:EU:C:2017:174, para 54.

[89] Case C-522/20, *OE* [2022] ECLI:EU:C:2022:87, para 21.

[90] *Wattel* appears to limit this standard of review only to the principle of equal treatment, implying that, with regard to other EU principles, the EU legislator does not enjoy broad discretion limited to manifestly inappropriate measures. See: Peter Wattel, ´Constitutional Foundations: EU Tax Competences; Treaty Basis for Tax Integration; Sources and Enactment of EU Tax Law` in Sjoerd Douma et al (eds), *European Tax Law* (9th edition, Wolters Kluwer 2025) page 24.

[91] See for a detailed analysis: Rita Szudoczky, ´The relationship between primary, secondary and national law` in Christiana HJI Panayi (eds), *Research Handbook on European Taxation Law* (Edward Elgar Publishing 2020); Jasper Korving, ´The European Triangle: On the relationship between Primary EU Law, Secondary EU Law and National Law in the Field of Direct Taxation` (2024) European Business Law Review Vol. 35, Issue 1.

[92] E.g. which field of law is concerned or whether a legislative, administrative or judicial process is being examined.

[93] A comprehensive analysis of the principle of legality with all its elements is not part of this thesis.

Regarding the use of dynamic references to the OECD level, the key questions are whether such references are, in principle, compatible with the principle of legality and if answered in the affirmative, what limits must be observed.

4.1 Normative derivation and basic concept

The underlying basic reason for the need for legislative legality is to restrain and to make predictable the use of political power.[94] On the one hand, it requires the observance of the hierarchy of norms, meaning that law must conform with higher-ranking law. On the other hand, it requires that state interference is always based on a legal basis.[95]

The CJEU concretized the principle of legality in relation to taxation and lifted it to a general principle of EU law, by stating that the principle of legality of taxation forms part of the legal order of the European Union as a general principle of law and requires "that any obligation to pay a tax and all the essential elements defining the substantive features thereof must be provided for by law, the taxable person having to be in a position to foresee and calculate the amount of tax due and determine the point at which it becomes payable."[96] In the former *Związek* case the CJEU added that the principle of legality of taxation does not require to regulate every technical aspect of taxation exhaustively.[97]

Normatively the CJEU derives the principle of legality of taxation from the constitutional traditions common to the Member States and the case law relating to Article 1 of the Protocol to the ECHR.[98] Moreover, since the author understands the principle of legality of taxation to be a special manifestation of the European principle of legality, it is also normatively connected to the rule of law enshrined in Article 2 TEU.

Thus, in essence, the European principle of legality of taxation demands the European legislator to provide a legal basis and to determine the essential features of the tax by law.

Furthermore, by elevating it to a general principle of EU law, it binds the European legislator and the Member States, when they exercise their legislative power in the field of tax law. In relation to the Member States however, the application is limited to harmonised fields of tax law.[99]

Before applying these requirements to dynamic references at the OECD level, some fundamental aspects of their specific application must be examined.

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[94] Franz Merli, ´Principle of Legality and the Hierarchy of Norms` in Werner Schroeder (eds), *Strengthening the Rule of Law in Europe* (Bloomsbury Publishing 2015) pages 40 et seq.

[95] See e.g. Case C-407/08, *Knauf* [2010] ECLI:EU:C:2010:389, para 91; Juliane Kokott, *EU Tax Law* (C.H. Beck 2022) § 2, para 5.

[96] Case C-885/19, *Fiat* [2022] ECLI:EU:C:2022:859, para 97.

[97] Case C-566/17, *Związek* [2019] ECLI:EU:C:2019:390, para 39.

[98] See Article 6 (3) TEU and Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 20.03.1952. The CJEU mentioned this in its Research Note ´Scope of the principle of legality of taxation, particularly in relation to value added tax` from the Directorate-General for Research and Documentation, September 2018.

[99] Case C-566/17, *Związek* [2019] ECLI:EU:C:2019:390, para 41; Sam van der Vlugt, ´The Principle of Legality of Taxation as a General Principle of EU Law: National and Supranational Differences of Interpretation and Potential Difficulties` (2023) EC Tax Review Vol. 32, Issue 5, 214, 218.

4.2 Application to EU Directives in Direct Taxation matters

In the CJEU judgements *Związek* and *Fiat*, the court`s wording refers to the obligation to pay a tax and to all its essential elements thereof. Thus, the application of the principle of legality of taxation depends on the specific content and objective of the relevant EU law. The EU law must harmonise aspects which concern substantial parts of the tax law. Notwithstanding that this always is a case-by-case assessment and that it is still uncertain how to define the substantial parts of a tax law,[100] the application criteria should allow for a wide margin of discretion for the EU legislator, when determining whether to apply the principle of legality of taxation.
However, in the author`s view, it is not generally applicable to every EU Directive based on Article 115 TFEU, which concerns matters of direct taxation.[101] In any way, the question of its application should not be overestimated. If the principle of legality of taxation does not apply to an EU Tax Law Directive, the general principle of legality still applies, imposing similar legal requirements on the EU legislator.[102]

To conclude, the principle of legality of taxation is not automatically applicable to every EU Tax Law Directive harmonising direct taxation issues. There must be a sufficiently direct link to the regulation of the obligation to pay a tax or its essential elements. For dynamic references to the OECD level, this implies that the standard of legality may vary according to the objective and content of the Directive. However, it is not clear whether the level of protection of the principle of legality of taxation and the general principle of legality differs in its application.[103] In the author`s view, the requirements of the principle of legality of taxation tend to be stricter, as it requires more elements to be regulated by law.

4.3 Notion of law

Two different layers in the concept of the principle of legality of taxation must be distinguished. First, it is necessary to define what formally qualifies as law on European level and second it needs to be evaluated how to assess the concept of the essential elements.

Positively ascertaining all acts that might qualify as law is not feasible due to the evolving nature of EU law and the number of different legal instruments. Certainly, EU primary law and EU secondary law, in the form of Regulations or Directives, constitute law under the principle of legality of taxation.[104] Crucially, the CJEU not only accepts Directives which are enacted under the ordinary legislative procedure,

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[100] See chapter 4.4.

[101] E.g. Council Directive (EU) 2016/1164 of 12 July 2016 on laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193 (ATAD), clearly concerns substantive features of a tax, as it affects the determination of the tax base. Conversely, Council Directive (EU) 2011/16 on administrative cooperation in the field of taxation [2011] OJ L 064 (DAC), does rather not concern substantive parts of a tax law.

[102] See Article 52 (1) CFR.

[103] A clear distinction between both principles has not yet been established.

[104] See e.g.: Case C-293/12, *Digital Rights Ireland* [2014] ECLI:EU:C:2014:238, paras 38 et seq., where the CJEU has not contested a Directive to fulfil the conditions of being law; Case T-138/23, *Ballmann* [2025] ECLI:EU:T:2025:735, para 68.

but also relies on Directives enacted under the special legislative procedure of Article 115 TFEU to fulfil the prerequisites of law under Article 52 (1) CFR.[105] Thus, it seems that the notion of law on the European legal level demands the observance of a legislative procedure established in the Treaties.[106] However, according to the CJEU in relation to Article 52 (1) CFR, the notion of law is not only definable from a formal perspective, but also consists of material requirements, namely to be binding, published, clear, precise and foreseeable.[107] As the CFR is part of EU primary law,[108] a uniform interpretation of the notion of law, extending beyond the CFR to the general principles of EU law is the only conceivable approach.
Conversely, already from a formal perspective, soft law adopted at the level of the OECD does not fulfil the requirements to qualify as law.

The foregoing leads to the conclusion that a Council Directive enacted under the special legislative procedure of Article 115 TFEU complies with the requirements of the notion of law under the principle of legality of taxation. To the contrary, soft law adopted at the level of the OECD does not constitute law and is, in principle, not able to satisfy the requirements of the principle of legality of taxation.
However, in the case of dynamic references to the OECD level, this entails only limited legal implications. As defined in this thesis, the dynamic reference itself is enacted in the Council Directive, and the referenced content automatically becomes part of the Directive through the mechanism of the dynamic reference. Accordingly, both the referring act and the incorporated OECD soft law constitute law within the meaning of the principle of legality of taxation.

4.4 Concept of essential elements provided by law

What remains to be answered is how to determine the essential elements of a tax that must be provided by law and in particular how dynamic references to the OECD might affect this determination.
The CJEU adopted a functional approach without enumerating every essential element of a tax, by connecting the substantive features of a tax to the position of the taxpayer, who must be able to foresee and calculate the amount of tax due and determine the payment date.[109] This excludes the necessity to specify every technical or formal detail by law. As a consequence of this approach, a clear distinction between essential elements of a tax and its technical or formal details is not possible, but instead depends on a case-by-case assessment taking into account the position and expectations of the taxpayer in relation to the purpose, systematics, severity and justification of the tax law.[110] The position of the taxpayer must be based on objective

[105] Case C-694/20, *Orde van Vlaamse Balies* [2022] ECLI:EU:C:2022:963; Case C-623/22, *Belgian Association of Tax Lawyers* [2024] ECLI:EU:C:2024:639.

[106] This excludes delegated or implemented acts under Articles 290, 291 TFEU, as they constitute non-legislative acts. However, it is important to note that EU primary law itself can suffice to satisfy the requirements of law, without a previous legislative procedure.

[107] Koen Lenaerts, ´Exploring the Limits of the EU Charter of Fundamental Rights` (2012) European Constitutional Review Vol. 8, page 389.

[108] See Article 6 (1) TEU.

[109] Case C-566/17, *Związek* [2019] ECLI:EU:C:2019:390, para 39; Case C-885/19, *Fiat* [2022] ECLI:EU:C:2022:859, para 97.

[110] Similar: Case C-566/17, *Związek* [2019] ECLI:EU:C:2019:390, Opinion of AG Sharpston, para 108.

factors and the determination of the essential elements must be verifiable through judicial review.[111] However, as the principle of legality of taxation derives from the constitutional traditions of the Member States, their interpretation of the national principle of legality might also influence the autonomous interpretation of the European principle of legality of taxation. Thus, according to the majority of the Member States constitutional interpretation of the principle of legality, at least the indication of who is a taxable person, the chargeable event giving rise to taxation, the basis for assessment of the tax, the tax rate and the procedural guarantees that the taxpayer enjoys, constitute the essential elements of a tax law.[112]
Whether the CJEU agrees with these elements remains unclear.

The determination of the essential elements of a tax grants some leeway to both the European and national legislator, as the concept itself does not provide a clear answer for every tax provision. Moreover, since the legislator decides on the specific framework of the tax law, it allows the legislator to influence the assessment of what constitutes those essential elements, as they depend on the law themselves. Nevertheless, the final decision ultimately lies in the responsibility of the CJEU, who can decide on the underlying objective framework and the compliance with the essentiality requirement.[113]

In this context, it is worth noting that the determination of essentiality under the principle of legality of taxation and under the delegation provided for in Article 290 TFEU contains certain similarities, which may justify applying the case law relating to Article 290 TFEU when interpreting the principle of legality of taxation. Both deal with the requirements for legislative law-making and the limits of executive rule-making. Moreover, both establish and influence the framework for institutional balance within the EU.[114] In the author`s view, however, this should be assessed with serious caution. This is because both approach the issue from different perspectives. The principle of legality of taxation focuses on the taxpayer`s rights and the need to effectively protect the individual against arbitrary taxation.[115] Conversely, the delegation requirements under Article 290 TFEU primarily concern the demarcation of the EU legislator and the Commission.[116] Thus, both interpret the determination of essentiality from a different reference point.

How dynamic references to the OECD must be evaluated under this approach? First, the essential elements of a tax law, which are necessary for the taxpayer to determine

[111] Case C-695/20, *Fenix* [2023] ECLI:EU:C:2023:127, para 42 in relation to Article 291 (2) TFEU.

[112] Case C-566/17, *Związek* [2019] ECLI:EU:C:2019:390, Opinion of AG Sharpston, para 89. See for a detailed analysis related to VAT: Research Note CJEU ´Scope of the principle of legality of taxation, particularly in relation to value added tax` from the Directorate-General for Research and Documentation, September 2018.

[113] See: Case C-695/20, *Fenix* [2023] ECLI:EU:C:2023:127, para 42; Merijn Chamon, ´The legal framework for delegated and implementing powers ten years after the entry into force of the Lisbon Treaty` (2021) ERA Forum 22, 21, 26.

[114] With regard to the principle of legality: Antonino Alì, ´The Principle of Legality as a Pillar of the EU`s Rule of Law: Bridging the Gap between International and National Law` in Luisa Antoniolli, Carlo Ruzza (eds), *The Rule of Law in the EU* (Springer 2024), page 237; Harald Eberhard, ´Das Legalitätsprinzip im Spannungsfeld von Gemeinschaftsrecht und nationalem Recht` (2008) Zeitschrift für öffentliches Recht Vol. 63, 49, 86.

[115] Franz Merli, ´Principle of Legality and the Hierarchy of Norms` in Werner Schroeder (eds), *Strengthening the Rule of Law in Europe* (Bloomsbury Publishing 2015) pages 44 et seq.

[116] Merijn Chamon, ´Institutional Balance and Community Method in the Implementation of EU Legislation following the Lisbon Treaty` (2016) Common Market Law Review 53, 1501, 1502 et seqq.

the tax liability and its payment date, must be provided by the Directive itself. This gives rise to a fundamental problem with the understanding of the mechanism of dynamic references in this thesis, as the referenced content becomes part of the Directive. This would lead to the unsatisfactory conclusion that the principle of legality of taxation does not, from a formal standpoint, limit the use of dynamic references to the OECD, since everything would in fact be determined in the Directive. However, the decisive point is whether and which procedures must be observed in order to satisfy the requirements of the principle of legality of taxation.[117]

Second, it needs to be addressed whether and how the dynamic mechanism of a dynamic reference to the OECD affects the determination of essentiality. Since dynamic references incorporate not only the latest version of the OECD`s soft law, but also subsequent soft law adopted after the enactment of the Directive, the determination of the essential elements could be even stricter in order to comply with the principle of legality of taxation. The underlying reason is the ´quasi-delegation`[118] of law-making power to the OECD for an indefinite period, with consequences that are difficult for the taxpayer to foresee and thus increasing the requirements on the determination of the essential elements.

In the author`s view, this depends on the level of judicial review. Both legal levels, the dynamic reference contained in the EU Directive itself and the soft law incorporated through that mechanism, must be judicially reviewable by the CJEU with regard to the compliance with the essentiality element. This implies, first, that the CJEU can assess the dynamic reference itself, in particular whether it only references essential elements to the level of the OECD. Second the CJEU can review the referenced content, here the OECD`s soft law, whether it complies with the limits of the dynamic reference in not determining essential elements.
Since both the dynamic reference and the referenced content form part of the EU Directive at the same legal level, the CJEU can review both. Therefore, in the author`s view, there is no need to apply stricter standards to dynamic references when determining the essential elements of a tax law.[119]

Before concluding this subchapter, it is important to highlight some of the ongoing questions concerning the interpretation of essentiality in the light of the principle of legality of taxation. Notwithstanding the general uncertainty on the definition of the essential elements of a tax law, it remains unclear to what extent and with what degree of precision those elements must be laid down by law. Does the principle of legality of taxation imply that the essential elements of a tax law, such as the tax rate, must be fully specified in the law itself? Or is it sufficient to clarify the core features of an essential element and leave the remainder to the OECD?[120]
The answer to this will depend on the specific tax law, nonetheless, a clarification from the CJEU would be helpful.

[117] See chapter 4.5.

[118] See chapter 2.3.3.

[119] This resembles the two layered judicial procedure from Article 290 TFEU. See: Merijn Chamon, ´Limits to delegation under Article 290 TFEU: The specificity and essentiality requirements put to the test` (2018) Maastricht Journal of European and Comparative Law Vol. 25 (2), 231, 232 et seq.

[120] E.g. to determine only the maximum and minimum applicable tax rate.

In conclusion, the European principle of legality of taxation requires the essential elements of a tax law to be provided in the Directive. The definition of the essential elements relies on a case-by-case assessment, depending on the specific design of the tax law. Additionally, the constitutional traditions of the Member States interpretation of the principle of legality may be used to concretize this. Case law on Article 290 TFEU and its interpretation of essentiality should not be relied upon when interpreting the principle of legality of taxation.
Regarding the use of dynamic reference, the requirement that the essential elements must be provided by law is insufficient due to the mechanism of dynamic references. The decisive question is whether the principle of legality of taxation also requires the observance of a specific democratic legislative procedure.
The dynamic character of dynamic references does not affect the assessment of what constitutes essential elements of a tax law.

4.5 Democratic legislative procedure

The CJEU has established the requirement of a legal basis, but has not clarified whether this entails specific democratic procedural requirements for the adoption of the law. It remains unclear whether the principle of legality of taxation demands an underlying democratic process prior to the adoption of the law.[121]
First, it must be evaluated whether the European principle of legality of taxation requires an underlying democratic process. Then, the implications on the legislative procedure under Article 115 TFEU and dynamic references to the OECD must be examined.

4.5.1 Inherent democratic element in the principle of legality of taxation?

The European principle of legality of taxation derives from the constitutional traditions common to the Member States and their interpretation and application of the principle of legality.[122] The national legal traditions seem to request the involvement of the parliamentary in the enactment of tax laws as a fundamental democratic prerequisite.[123] This alone does not suffice to confer these standards to the European legal level. Article 6 (3) TEU states that the traditions common to the Member States serve as a source of inspiration in the determination of these principles. These constitutional traditions are not immediate sources and do not bind the CJEU in the determination of the autonomous EU general principles.[124] Furthermore an extension of the Member States democratic prerequisites in relation to tax laws ignores the fundamental differences between the national legal order and the European legal order.[125]

[121] Sam van der Vlugt, ´The Principle of Legality of Taxation as a General Principle of EU Law: National and Supranational Differences of Interpretation and Potential Difficulties` (2023) EC Tax Review Vol. 32, Issue 5, 214, 221.

[122] Case C-566/17, *Związek* [2019] ECLI:EU:C:2019:390, para 39.

[123] A comprehensive comparative analysis is not part of this thesis. See for a detailed analysis with regard to some Member States: Ana Paula Dourado, *Separation of powers in tax law* (IBFD 2010).

[124] Tobias Lock in Manuel Kellerbauer et al (eds), *The EU Treaties and Charter of Fundamental Rights: A Commentary* (2nd edition, Oxford University Press 2024) Art. 6 TEU, para 22.

[125] Gianluigi Bizioli, ´EU Taxes and "No Taxation without Representation"` in Peter Essers (eds), *History and Taxation* (IBFD 2022) page 135.

Nevertheless, it indicates that democratic elements might also be part of the interpretation of the European principle of legality.

The decisive argument lies in the CJEU`s wording. The principle of legality of taxation requires the enactment of a law. What qualifies as law is determined by the Treaties and the CJEU.[126] Any legal act that is considered a law must comply with the procedural and substantive requirements set out in the relevant legal provision to become legally binding and hence meet the criteria to qualify as law. The process for enacting a law is regulated in the Treaties.[127] To become legally binding, it suffices to comply with this process.
Therefore, it can be stated, as an initial point, that the notion of law in light of the principle of legality of taxation presupposes a due legislative procedure.

The European Union is founded on the value of respect for democracy.[128] The TEU further specifies the value and impact of democratic principles in Articles 9 – 12 TEU by conceptualizing the basic requirements of democracy on the European level.[129] Furthermore, the CJEU stated the importance of the participation of the European parliament in the legislative process, since it reflects a fundamental democratic principle that the people are involved in the exercise of power through the intermediary of a representative assembly.[130]
Sufficient democratic legitimacy and the principle of legality of taxation must therefore not be considered separately, but rather as intertwined and mutually interdependent.[131] This implies that the principle of legality of taxation requires a democratic process as a precondition to enact EU tax law.[132]

The question that follows is how the legislative procedures stipulated in the Treaties and the principle of legality of taxation and its need for sufficient democratic legitimacy can be reconciled with each other. In the author`s view, the legal basis provisions under the Treaties concretize and implement the democratic principles within a legislative procedure. Consequently, in principle, the legislative procedures sufficiently ensure compliance with the necessity of adequate democratic legitimacy. This can be supported by Article 1 (3) TEU, which provides that the TEU and the TFEU both have the same legal value. Accordingly, formally they have the same legal rank and cannot be challenged or reviewed against one another. It follows that the principle of legality of taxation, as a general principle of EU primary law, does not take precedence over the legislative procedures stipulated in the Treaties. Otherwise, it could be argued that a legislative procedure under the Treaties fails to

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[126] See chapter 4.3.

[127] See e.g. the procedures in Articles 113, 114, 115 TFEU.

[128] See Article 2 TEU.

[129] See for an attempt to describe the basic requirements for democratic legitimacy: Lorenz Boddenberg, ´Article 32 of the Global Minimum Tax Directive as a Dynamic Reference – Challenges in relation to the European Principle of Democracy` (2026) Paper Lund University [not published].

[130] Case C-390/15, *RPO* [2017] ECLI:EU:C:2017:174, para 25.

[131] Joachim Englisch, ´Dynamic References to International Soft Law Agreements: Flexibility with Limits` (2024) EC Tax Review Vol. 33, Issue 1, 2, 3.

[132] With regard to the principle of legality: Amichai Magen/Laurent Pech, ´The rule of law and the European Union` in Christopher May, Adam Winchester (eds), *Handbook on the Rule of Law* (Edward Elgar Publishing 2018) page 242.

comply with the democratic principles set out in Articles 9 – 13 TEU and is therefore no longer capable of producing EU secondary law.[133]

From a democratic-theoretical perspective, the legislative procedures may be inadequate,[134] however, from a legal standpoint under the Treaties, they cannot be challenged.[135]

This can be supported by the CJEU`s wording in its *RPO* judgement.[136] The CJEU connects the effective participation of the Parliament in the legislative process with the procedures laid down in the Treaties. Participation of the Parliament beyond the requirements of the legislative procedure is not requested.

Nevertheless, this only applies to the European legislative procedures. Due to the primacy of EU law over the domestic law of the Member States, the European principle of legality of taxation takes precedence over the national principle of legality when assessing harmonised fields of tax law, which may result in national legislative procedures failing to sufficiently ensure democratic backcoupling.

Accordingly, the principle of legality of taxation requires the essential elements of a tax law to be provided through a due legislative procedure under the Treaties. The essential elements of a tax law must be adopted in accordance with the procedures established in the legal basis provisions under the Treaties. This implies that the essential elements of a tax law must be determined and provided through the relevant legislative procedure and must not be established by other bodies. When the relevant legislative procedure is complied with, the resulting law satisfies the requirement of sufficient democratic legitimacy under the principle of legality of taxation.

4.5.2 Significance for Article 115 TFEU and Dynamic References to the OECD

Although an analysis of the democratic legitimacy of the procedure under Article 115 TFEU is not part of the thesis, its democratic legitimacy has been questioned in legal literature.[137] With regard to the principle of legality of taxation, these concerns can be set aside. From a purely legal standpoint, Article 115 TFEU sufficiently concretize the inherent democratic elements of the principle of legality of taxation through a formal legislative procedure established in EU primary law.[138] Consequently, it is not the abstract democratic elements of the procedure that are

[133] Example from: Jürgen Bast/Armin von Bogdandy, ´The Constitutional Core of the Union: On the CJEU`s new, principled Constitutionalism` (2024) Common Market Law Review Vol. 61, 1471, 1491.

[134] E.g. Vivien A. Schmidt, *Europe`s Crisis of Legitimacy: Governing by Rules and Ruling by Numbers in the Eurozone* (Oxford University Press 2020), pages 25 et seqq.

[135] Formal equality does not imply that EU primary law also shares the same substantive value. There is an ongoing discussion to what extent EU primary law may differ in legal effect and value. The author, however, considers this discussion not to be relevant to answering the legal question at hand. See for more details: Jürgen Bast/Armin von Bogdandy, ´The Constitutional Core of the Union: On the CJEU`s new, principled Constitutionalism` (2024) Common Market Law Review Vol. 61; Luke Dimitrios Spieker, ´Primary Law as Pyramid: The Case for Substantive Hierarchies in EU Primary Law` in Luigi Lonardo, Alezini Loxa (eds), *The Reasoning of the Court of Justice of the EU: A Normative Assessment* (Oxford University Press 2026) pages 105 et seqq.

[136] Case C-390/15, *RPO* [2017] ECLI:EU:C:2017:174, para 25.

[137] See e.g.: Frans Vanistendael, ´On Democratic Legitimacy of European Tax Law and the Role of the European Parliament` in Pasquale Pistone (eds), *European Tax Integration: The Need for a Traffic Light at the Crossroads of Law, Policy and Politics* (IBFD 2018).

[138] The author is aware that this is a positivist legal interpretation. See for further details: Hans Kelsen, ´Reine Rechtslehre` in Matthias Jestaedt (eds), *Reine Rechtslehre* (2nd edition, Mohr Siebeck 2017) pages 74 et seqq.

decisive, but the due compliance with the procedure under Article 115 TFEU. If these requirements are not observed, the law is unlawful and void.[139]

The procedures at the level of the OECD and the IF stand in no correlation with the legislative procedures under the Treaties. The procedures are autonomous and independent of the European legal framework on legislative procedures. Therefore, the soft law generated at the level of the OECD does not satisfy the required legislative process to constitute law under the principle of legality of taxation.[140]
This is important to emphasize. Under the definition and mechanism applied in this thesis, the referenced content becomes EU law. However, the procedure to establish the referenced content at the level of the OECD does not comply with the legislative procedures under the Treaties, which are necessary to produce legally binding EU law. Thus, the OECD`s soft law cannot be reconciled with the principle of legality of taxation.
The essential elements of a tax law must be enacted through the procedure under Article 115 TFEU and cannot be referred to the level of the OECD. Therefore, a Council Statement or a Commission Notice is not sufficient to comply with the required respect for the underlying legislative procedure under Article 115 TFEU.[141] Neither is enacted in accordance with the requirements set out in Article 115 TFEU and is therefore not legally binding. Both instruments only constitute soft law.[142] They disregard the participation of the European Parliament and the Economic and Social Committee in the consultation process and the initiative right of the Commission.[143]

4.6 Implications of the national implementation

Due to the multi-tiered EU legal system, the use of dynamic references to the OECD under the principle of legality of taxation must also be evaluated considering the obligation of the Member States to implement the Directive`s intended result into national law.
According to the CJEU, the European principle of legality of taxation takes precedence over the national principle of legality when assessing harmonised fields of tax law.[144] This only concerns the normative standard to be observed by the Member States. However, in the author`s view, in the specific context of harmonised direct tax law under Article 115 TFEU, both the European principle of legality of taxation and the national requirements for legality can be adhered to, since the Member States enjoy the choice of form and methods and are allowed to establish

[139] See e.g.: Case C-138/79, *Roquette Frères* [1980] ECLI:EU:C:1980:249, paras 33 and 37.

[140] From this formal standpoint, it is insignificant how democratic the procedures at the level of the OECD or IF might be. The principle of legality of taxation precludes the recognition of soft law as law already from the outset.

[141] See e.g. the Commission Notice on ´The OECD Inclusive Framework Agreement on Safe Harbours and the Pillar Two Directive`, 12.1.2026, C/2026/253 and Council Statement on ´Two-pillar solution to address the tax challenges arising from the digitalisation of the economy`, 30.10.2023, 14723/2/23 REV 1.

[142] See with regard to Council Statements: Case C-226/11, *Expedia Inc.* [2012] ECLI:EU:C:2012:795, para 29.

[143] With a different assessment: Daniela Hohenwarter/Gunter Mayr, ´Pillar Two and BEFIT: Shocks and Opportunities for the EU internal market` (2024) European Taxation Vol. 64, Issue 10, 437, 444.

[144] Case C-566/17, *Związek* [2019] ECLI:EU:C:2019:390, para 41.

more elements by domestic law where the national principle of legality imposes higher standards of essentiality.[145]
Moreover, the normative precedence does not preclude national implementation to contribute to ensure compliance with the European principle of legality of taxation. It has not yet been determined whether the requirement that the essential elements of a tax law be adopted through a legislative procedure must be fully complied with at the European level in the form of a Directive, or whether national implementation may also contribute to provide the essential elements by law.

In this regard, two implications must be distinguished. First, the principle of legality of taxation binds both the European and the national legislator in requiring that the essential elements of a tax law be adopted by law through a legislative procedure and might not be referenced to another body, such as the OECD. Second, the question whether the essential elements are provided by law must be assessed from the perspective of the taxpayer. This means that the Directive does not need to comprehensively establish each essential element itself but is complemented by the national implementation so that the taxpayer is able to foresee and calculate the amount of tax due and determine the point at which it becomes payable. Both legal acts are interdependent and complement each other. Since a Directive typically allows for a greater degree of indeterminacy, as it is addressed to the Member States rather than the taxpayer, the national implementation contributes to the compliance with the essentiality requirement of the principle of legality of taxation.[146]

5 Conceptualising Dynamic References to the OECD

5.1 General admissibility of Dynamic References

The principle of legality of taxation sets the framework for the admissibility of dynamic references to the OECD in EU secondary legislation. The previous chapters elaborated on this concept in order to determine the obligations imposed on the EU legislator. The crucial requirement is the obligation to determine the essential elements of a tax law through the legislative procedures established in the EU Treaties. Conversely, non-essential elements must not necessarily be adopted through the legislative procedures provided in the EU Treaties. However, this consequence remains rather vague. Does it imply that non-essential decisions may be adopted by bodies outside the EU institutional framework or does it also impose requirements for the choice of the ´legislator` responsible for determining the non-essential elements of a tax law? In other words, it is unclear whether the ´legislator`, who might be responsible to establish the non-essential elements of a tax law, must

[145] However, the precedence of the European principle of legality of taxation precludes Member States from applying a lower standard of legality.
[146] Harald Eberhard, ´Das Legalitätsprinzip im Spannungsfeld von Gemeinschaftsrecht und nationalem Recht` (2008) Zeitschrift für öffentliches Recht Vol. 63, 49, 104 et seqq.

comply with any requirements concerning its democratic legitimacy, procedural decision-making or institutional integration within the EU framework.

In the case of the OECD, this issue is particularly relevant. The OECD and the IF are not institutionally connected to the EU and although the EU participates in their work, the EU is not a formal member and has no formal voting rights. This distinguishes the OECD from other external standard-setters, such as European Agencies. These agencies are created through EU secondary legislation, and their procedures, accountability mechanisms and composition are regulated by the EU institutions themselves.[147]

In the author`s view, therefore, the question whether the principle of legality of taxation requires the ´legislator` of the non-essential elements to comply with minimum standards of democratic legitimacy, accountability, procedural fairness and judicial review should not be underestimated. Likewise, the adoption of non-essential elements cannot be made without regard to certain minimum legal standards. All these considerations must be carefully assessed and balanced against one another, before implementing dynamic references in EU secondary legislation. Since the principle of legality of taxation constitutes a general principle of EU law, it is not absolute but must be weighed and balanced against other legitimate legal values and interests.

Regarding dynamic references to the OECD, as constructed in this thesis, it is important to note the legal safeguards and benefits. The referenced content is fully subject to judicial review. The determination of the scope of the dynamic reference is democratically legitimized through the legislative procedure under Article 115 TFEU and is limited to non-essential elements of the tax law. Furthermore, the referenced content itself must comply with EU primary law.[148] Finally, the EU legislator remains free to repeal the dynamic reference or amend it through the special legislative procedure in Article 115 TFEU.

Additionally, they can significantly contribute to the effective functioning of the tax law. Taking the Global Minimum Tax Directive[149] as an example, dynamic references to the OECD help to ensure the consistent and uniform application of the law, which is crucial for the functioning of the applied mechanisms.[150]

Taking these considerations into account, dynamic references to the OECD are, in principle, compatible with the principle of legality of taxation, provided that they remain within the strict limits and requirements imposed by that principle.[151]

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[147] See: Edoardo Chiti, ´Decentralized Implementation: European Agencies` in Robert Schütze, Takis Tridimas (eds), *Oxford Principles of European Union Law* (Oxford University Press 2018).

[148] E.g. the Fundamental Freedoms in Articles 26 et seqq. TFEU.

[149] Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union, OJ L 328/1.

[150] See for a detailed explanation of the mechanisms: Marjaana Helminen, *EU Tax Law – Direct Taxation* (2024 Edition, IBFD) pages 309 et seqq.

[151] Similar: Joachim Englisch, ´Hardening International Soft Law Standards Through EU Law: From Greater National Autonomy to a Legal Straitjacket?` in Raymond Luja (eds), *National Tax Autonomy and the European Union* (IBFD 2024) pages 82 et seq.; Opinion of AG Kokott in Case C-457/21, *Amazon* [2023] ECLI:EU:C:2023:466, para 72, but in relation to state aid.

5.2 Legal limits and safeguards

Albeit this thesis affirms the compatibility of dynamic references to the OECD with the European principle of legality of taxation, it remains important to consider possible legal limits and safeguards that complement the requirements arising from that principle.

First, since dynamic references allow another ´regulator` to impact EU secondary law through the referenced content, they share certain characteristics with the delegation of powers. Therefore, besides the essentiality requirement, an additional specificity requirement, inspired by the framework of Article 290 TFEU, should be established. This implies that the dynamic reference to the OECD must define the objectives, content, scope and duration of the reference with sufficient precision.[152] Since only the non-essential elements may be determined by the OECD, these specificity requirements apply only to defining and delineating the OECD`s power to establish technical or formal details of a tax law.

Second, the principle of legality of taxation limits the use of dynamic references alongside the principle of subsidiarity and the principle of proportionality laid down in Article 5 (3), (4) TEU. When adopting a dynamic reference to the OECD, the EU legislator must assess whether the determination of non-essential elements of the tax law cannot be sufficiently achieved by the Member States and can instead be implemented more successfully by the Union through the use of a dynamic reference. Furthermore, the dynamic reference shall not exceed what is necessary to achieve the objective of the Treaties, meaning that it must be appropriate for realising a legitimate aim and must not go beyond what is necessary to achieve them.[153] In this regard, it is important to emphasize that both the dynamic reference and the referenced content must comply with these principles.

Third, the CJEU should apply a strict standard of review when assessing the compliance with the essentiality and specificity requirements.[154] Otherwise, it would risk undermining the essence of the principle of legality of taxation, namely the respect for democratic legislative procedures that ensure sufficient democratic legitimacy and preserve the institutional balance between legislative law-making and executive rule-making. However, given the political compromise required to enact tax legislation under the unanimity procedure of Article 115 TFEU, it remains to be seen whether the CJEU will apply a strict review of these requirements or instead opt for a more restricted approach, thereby granting the EU legislator a broad margin of discretion.[155]

[152] See for Article 290 TFEU: Merijn Chamon, ´Limits to delegation under Article 290 TFEU: The specificity and essentiality requirements put to the test` (2018) Maastricht Journal of European and Comparative Law Vol. 25 (2), 231, 244. One can also consider this to be part of the essentiality requirement of the principle of legality of taxation.

[153] Case C-58/08, *Vodafone* [2010] ECLI:EU:C:2010:321, para 51.

[154] With regard to the principle of subsidiarity and proportionality the CJEU applies a rather generous approach. See: Marcus Klamert in Manuel Kellerbauer et al (eds), *The EU Treaties and Charter of Fundamental Rights: A Commentary* (2nd edition, Oxford University Press 2024) Art. 5 TEU, paras 32 and 41.

[155] Rita de la Feria, ´Pillar 2, Fiat, and the EU Unanimity Rule on Tax Matters` (2023) EC Tax Review Vol. 32, Issue 1; Peter Wattel, ´Constitutional Foundations: EU Tax Competences; Treaty Basis for Tax Integration; Sources and Enactment of EU Tax Law` in Sjoerd Douma et al (eds), *European Tax Law* (9th edition, Wolters Kluwer 2025) page 23.

What can be concluded is that dynamic references to the OECD are subject to adequate legal requirements that, at least in theory, function as sufficient legal safeguards. It is for the principal EU actors in the field of direct taxation, namely the Council and the CJEU, to ensure that these requirements are respected accordingly and effectively observed in practice.

6 Conclusion and future perspectives

This thesis limits its analysis of dynamic references to a specific subject of research. In academic literature, there is an ongoing debate concerning the legality of dynamic references to OECD standards and the legal implications such references entail for EU and national law. Within these discussions, the legal mechanisms underlying dynamic references are neither uniformly understood nor commonly accepted and vary in design and legal effect. Accordingly, this thesis seeks to contribute to this debate by proposing one possible conceptualisation of dynamic references to OECD standards and by analysing its compatibility with the European principle of legality of taxation.

It is important to note, however, that alternative conceptualisations of dynamic references may lead to different conclusions. Furthermore, while the European principle of legality of taxation constitutes the primary framework for the legal analysis undertaken in this thesis, additional issues regarding democratic legitimacy, institutional balance and the constitutional frameworks of the Member States are also closely connected to this question and may affect the compatibility of dynamic references to OECD standards. Consequently, this thesis does not claim to provide a comprehensive analysis of all dimensions of this question.

Dynamic references to OECD standards comply with the European principle of legality of taxation insofar as they only refer to non-essential elements at the level of the OECD. Which elements are to be regarded as essential must be determined on a case-by-case basis taking into account the objective, systematic, wording and legislative history of the relevant tax legislation. In this context, the constitutional traditions of the Member States should serve as an interpretative aid in identifying the elements that must be considered essential. Moreover, the relevant reference point is the taxpayer and their capability to foresee and calculate the amount of tax due and determine the point at which it becomes payable.

Conversely, the essential elements of a tax law must be adopted through a democratic legislative procedure established in the Treaties, in particular the procedure laid down in Article 115 TFEU for matters of direct tax law.

Provided dynamic references are employed in the way described in this thesis, sufficient legal limits and safeguards exist to ensure their compliance with the principle of legality of taxation and to protect against arbitrary and unlawful use by the EU legislator. Crucially, the essentiality requirement of the principle of legality

of taxation should be complemented by a specificity requirement to clearly define and limit the OECD`s legislative power when using dynamic references.
Nevertheless, the practical effects of these legal limits and safeguards ultimately depend on the CJEU and its assessment in the future.

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